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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. A-984

JIMMIE L. WALTERS,
Petitioner,

vs.

STATE OF ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Arkansas

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statute Involved	3
Statement	3
A. Course of proceeding in the case now before this Court	3
B. Relevant facts concerning the case before this Court	4
Reasons for Granting the Writ	6
I. The Arkansas Supreme Court decided the issue of double jeopardy in a way contrary to the provisions of the Fifth and Fourteenth Amendments and the decisions of this Court. The facts of this case present a unique and novel question of double jeopardy to this Court	6
II. The Arkansas Supreme Court's finding that there was no preoccupation on the part of the trial judge in helping the prosecution obtain a conviction is contrary to the fair trial and due process protections of the Sixth and Fourteenth Amendments, where the record shows a denial of a hearing as to the voluntariness of petitioner's confession	9
III. The Arkansas Supreme Court's finding of no preoccupation on the part of the trial judge in helping the prosecution obtain a conviction was contrary to the fair trial and due process provisions of the	

Sixth and Fourteenth Amendments, where the record shows conduct and remarks of the trial judge and the prosecution clearly prejudicial to the petitioner 12

Conclusion 14

Appendices A-1

A. Opinion of the Supreme Court of the State of Arkansas A-1

B. Journal Entry of Judgment of the Circuit Court of Van Buren County, Arkansas A-5

LIST OF AUTHORITIES CITED

Cases

Alford v. U.S., 282 U.S. 687, 51 S.Ct. 218 12

Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056 6

Berger v. U.S., 255 U.S. 22, 41 S.Ct. 233 13

Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 10

Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245 10

Downum v. U.S., 372 U.S. 734, 83 S.Ct. 1033 ..... 2, 7

Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758 10

Ex Parte Lange, 18 Wall. 163, 21 L.Ed. 872 7

Gori v. U.S., 367 U.S. 364, 81 S.Ct. 1523 ..... 2, 7

Green v. U.S., 355 U.S. 184, 78 S.Ct. 221 ..... 2, 7, 8, 9

Haynes v Washington, 373 U.S. 503, 83 S.Ct. 1336 11

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 13

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 10
Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 ..... 2, 5, 9, 11, 12, 14
Knapp v. Kinsey, 232 F.2d 458 (6th Cir. 1956) 13
Miranda v. Arizona, 384 U.S. 486, 86 S.Ct. 1602 .. 2, 4, 10, 11
Price v. Georgia, 398 U.S. 323, 90 S.Ct. 1757 ..... 8, 9
Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639 11
U.S. v. Ah Kee Eng, 241 F.2d 157 (2d Cir. 1957) 13
U.S. v. Escandar, 465 F.2d 438 (5th Cir. 1972) 10
U.S. v. Jorn, 400 U.S. 470, 91 S.Ct. 547 ..... 2, 8, 9
U.S. v. Perez, 9 Wheat. 579, 6 L.Ed. 165 ..... 6, 9
Whitaker v. McLean, 118 F.2d 596 (D.C.C.A. 1941) ... 13

Others

Fifth Amendment, United States Constitution 2, 3, 9, 14
Sixth Amendment, United States Constitution ... 2, 3, 9, 12, 14
Fourteenth Amendment, United States Constitution 2, 3, 9, 11, 12, 14
Ark. Stat. Ann. § 43-1226 (Repl. 1964) 3, 6

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To the Supreme Court of Arkansas

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Jimmie L. Walters, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on January 21, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas is reported at 255 Ark. 904, 503 S.W.2d 895 (1974), and is printed in Appendix "A" hereto, infra, page A-1. The journal entry of judgment of the Circuit Court of Van Buren County, Arkansas is printed in Appendix "B" hereto, infra, page A-5.

JURISDICTION

The judgment of the Supreme Court of Arkansas (Appendix A, infra, page A-1) was entered on January 21, 1974. Rehearing was not sought. Justice Blackmun extended the time for this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether one accused of a crime of first degree murder may be tried again for the higher offense in violation of the Fifth and Fourteenth Amendments and of this Court's decisions in *Green v. U.S.*, 355 U.S. 184; *Price v. Georgia*, 398 U.S. 323; *U.S. v. Jorn*, 400 U.S. 470; *Gori v. U.S.*, 367 U.S. 364; *Downum v. U.S.*, 372 U.S. 734; after the jury reports its deliberations in open court that it is deadlocked between outright acquittal and a conviction for no higher offense than involuntary manslaughter.

2. Whether the jury's findings of an absence of a premeditated, intentional or malicious act bar prosecution again for the higher offense under the Fifth and Fourteenth Amendments.

3. Whether the petitioner was denied due process of law and a fair and impartial trial guaranteed under the Sixth and Fourteenth Amendments by admission into evidence of his purported confession without affording him an in camera hearing on the admissibility of such confession as required in *Jackson v. Denno*, 378 U.S. 368, and in the absence of some showing that the petitioner had been appropriately advised of his Fifth and Sixth Amendment rights pursuant to *Miranda v. Arizona*, 384 U.S. 486, or that he had voluntarily, knowingly and intelligently waived those rights.

4. Whether the petitioner was denied due process of law and a fair and impartial trial guaranteed under the Sixth and Fourteenth Amendments by prejudicial comments by the trial judge and the prosecution in the presence of the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution.

2. The Sixth Amendment, United States Constitution.

3. The Due Process Clause, Fourteenth Amendment, United States Constitution.

4. *Ark. Stat. Ann.* § 43-1226 (Repl. 1964).

> "43-1226 Offense of different degrees—Where an offense consists of different degrees, a conviction, or acquittal by judgment upon a verdict shall be a bar to another prosecution for the offense in any of its degrees."

STATEMENT

A. Course of proceedings in the case now before this Court.

In February, 1973, petitioner was tried for first degree murder in the Circuit Court of Van Buren County, Arkansas in the case entitled, State of Arkansas v. Jimmie L. Walters, and a mistrial was declared (App. "A").

On March 5, 1973, petitioner filed a motion to suppress statements taken from petitioner (T. 6-A).

On April 4, 1973, petitioner filed a motion in the trial court to dismiss the charges of first degree murder, second degree murder, and voluntary manslaughter (T. 7-A, 8-A).

On May 10, 1973, petitioner was again tried on the same charge of first degree murder in the Circuit Court of Van Buren County, Arkansas in the case entitled, *State of Arkansas v. Jimmie L. Walters*, No. CR 5-73, and was found guilty by a jury of the offense of second degree murder. Judgment was entered and petitioner was sentenced to five years imprisonment (App. "B").

On January 21, 1974, the Arkansas Supreme Court affirmed the judgment of the trial Court (App. "A").

B. **Relevant facts concerning the case before this Court:**

The petitioner was charged with the crime of murder in the first degree (T. 4-A). A mistrial was declared at the conclusion of the first trial after the jury reported in open court its deliberations, that it was deadlocked 7 to 5, one segment voting for acquittal, and the other for conviction of the lesser offense of involuntary manslaughter (App. "A"). At the commencement of the second trial, the petitioner pleaded the doctrine of former jeopardy as a bar to prosecution for any higher offense than involuntary manslaughter, inasmuch as the first jury's finding, reported in open court, exonerated the petitioner of any premeditated, intentional or malicious slaying or criminal action (App. "A") (T. 7-A).

The trial judge denied petitioner's motion or plea of former jeopardy and subjected the petitioner a second time to a prosecution for murder in the first degree.

Just prior to the second trial, petitioner filed a motion to suppress statements taken from him by the State without first advising petitioner of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 486, and which were involuntarily made (T. 6-A). During the course of the second trial, the trial court denied

petitioner a hearing on the voluntariness of his confession as required by *Jackson v. Denno*, 378 U.S. 368, (T. 49) on the basis that petitioner had waived his rights at a hearing in chambers prior to the second trial (T. 1, 2).

The record is replete with numerous prejudicial comments and acts by the trial judge and the prosecutor (T. 1, 2, 48, 49, 119, 120, 157).

The second trial ended in a conviction of murder in the second degree (App. "A"). It should be noted that at the second trial when the jury reported it was hung, the trial court sent the jury back for further deliberations (T. 193), while at the first trial when the jury reported it was hung, the trial court declared a mistrial (App. "A"). On his appeal to the Arkansas Supreme Court, petitioner relied principally on the doctrine of former jeopardy as a ground for reversal, but also relied on the trial court's preoccupation in assisting the prosecutor in obtaining a conviction (App. "A"). The Arkansas Supreme Court ruled and determined that the statements by the trial court and the jury foreman at the first trial could not be considered as a formal verdict of the jury, and summarily rejected the petitioner's contention that the trial court was preoccupied in assisting the prosecutor in obtaining a conviction (App. "A").

REASONS FOR GRANTING THE WRIT

I

The Arkansas Supreme Court decided the issue of double jeopardy in a way contrary to the provisions of the Fifth and Fourteenth Amendments and the decisions of this Court. The facts of this case present a unique and novel constitutional question not heretofore decided by this Court.

It is well settled that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed. 2d 707.

The Arkansas Supreme Court found that there was no implied acquittal of the petitioner of the offenses above involuntary manslaughter (App. "A"). The Court, basing its decision on *United States v. Perez*, 9 Wheat. 579, 6 L.Ed. 165 (1824), found that there was no abuse of discretion by the trial court in declaring a mistrial. The Court further held,

> ". . . the statements between the trial court and the jury foreman cannot be considered under the circumstances as a verdict of the jury" under *Ark. Stat. Ann.* § 43-1226 (Repl. 1968).

The Arkansas Supreme Court glossed over the most important element of the *Perez* decision, that there must be a "manifest necessity" to declare a mistrial and discharge a jury before a verdict is entered. Furthermore,

> ". . . the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *U. S. v. Perez*, supra.

Jeopardy attaches when a mistrial is declared to harass an accused by a subsequent trial or to give the State a better chance

to convict at a second trial. Before a mistrial is declared, the Court is to resolve any doubt in favor of an accused's liberty, rather than exercise an "unlimited, uncertain and arbitrary judicial discretion." *Downum v. U. S.*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); *Gori v. U. S.*, 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961). The accused should not be subjected to the "embarrassment, expense and ordeal" of a second trial which forces "him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Ex Parte Lange*, 18 Wall. 163, 21 L.Ed. 872; *Green v. U. S.*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

In *Green v. U. S.*, supra, the jury, although having the opportunity to convict the defendant of either first or second degree murder, found him guilty of only second degree murder. Green appealed and the conviction for second degree murder was reversed and remanded. At a new trial he was again tried for first degree murder.

This Court, holding that the second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution, stated:

> "In this situation the great majority of cases in this country have regarded the jury's verdict as an *implicit acquittal* on the charge of first degree murder. But the result in this case need not rest alone on the assumption which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. *For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent.* * * * Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.
>
> "* * * We believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had re-

> turned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree." (Emphasis supplied.)

To the same effect as *Green*, supra, was this Court's decisions in *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757 (1970), and which the Arkansas Supreme Court passed over without comment on appeal in this case (App. "A").

In the *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (1971), this Court established petitioner's option to have his case considered by the first jury and the petitioner is denied that option when the trial judge aborts the trial without the petitioner's consent. It is clear that the peitioner here did not consent to the declaration of a mistrial, but the Arkansas Supreme Court treated the decision in *United States v. Jorn*, supra, as not being applicable to petitioner's case on appeal (App. "A").

It must be noted that the trial court did not declare a mistrial until the jury announced that it was deadlocked between involuntary manslaughter and not guilty. This was noted on appeal and the Arkansas Supreme Court held that it was an "inadvisable" act, but that the record indicated that the trial court had already indicated an intent to declare a mistrial (App. "A"). The point that is important here is that the trial court had not declared a mistrial, the jury had not previously been asked to deliberate further, and the court could have sent the jury back for further deliberations.

Under the decision of the Arkansas Supreme Court in this case and all cases such as this, there would always be a "manifest necessity" to declare a mistrial where the jury first hints that it is deadlocked. The trial court could always arbitrarily pick and choose when to declare a mistrial, after finding out how the jury stood on different degrees of an offense. Under this decision the trial court could arbitrarily declare a mistrial if the jury indicated that it might convict of a higher offense. The de-

cision rendered by the Arkansas Supreme Court distorts beyond recognition the principles of *United States v. Perez*, supra; the protection of the Fifth Amendment's bar against double jeopardy; and the concepts of due process of law of the Fourteenth Amendment.

It is clear in this case that there was no "manifest necessity" to declare the first trial a mistrial; that the jury in the first instance had already acquitted the petitioner of any offense higher than involuntary manslaughter; and that the jury had found an absence of a premeditated, intentional, or malicious act on the part of petitioner. It is equally clear, that under the concepts stated in *Green v. United States*, supra, *United States v. Jorn*, supra, and *Price v. Georgia*, supra, the petitioner could not have been tried a second time for an offense higher than involuntary manslaughter.

The Arkansas Supreme Court applied the concepts of the Fifth Amendment's bar against double jeopardy grudgingly and narrowly and deprived petitioner of due process of law.

II

The Arkansas Supreme Court's finding that there was no preoccupation on the part of the trial judge in helping the prosecution obtain a conviction is contrary to the fair trial and due process protection of the Sixth and Fourteenth Amendments, where the record here shows a denial of a hearing as to the voluntariness of petitioner's confession.

At the second trial, the petitioner's statement was admitted into evidence (T. 49) without a judicial determination as to whether or not the statement was voluntarily made as required by *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 90 (1964).

Petitioner's contention on appeal that the trial court was preoccupied in helping the prosecution obtain a conviction raised

the issue of denial of a fair trial and due process and thereby fairly placed the issue here before the Arkansas Supreme Court.

The record of the second trial shows that no Miranda warnings were given to petitioner prior to his making statements to various law enforcement officers (T. 6, 18) and prior to the taking of his written statement by the Arkansas State Police (T. 32, 48) as required by this Court's decision in *Miranda v. Arizona*, 384 U.S. 486, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Prior to the second trial a hearing was held in chambers at which the petitioner was held to have waived his constitutional right under *Miranda*, supra, and other constitutional rights which were not defined. (T. 1, 2).

The question of waiver is controlled by federal law and there is a "presumption against waiver of constitutional rights." *Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966). An accused must have "actual knowledge" of the existence of his constitutional rights, "full understanding of their meaning and clear comprehension of the consequences of their waiver", *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937); *U.S. v. Escandar*, 465 F. 2d 438 (5th Cir. 1972), and the record must show a basis for the conclusion of the required knowledge and explanation. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274.

The State failed to sustain the "heavy burden" placed on it to show that the petitioner waived his Fifth and Sixth Amendment rights. *Miranda v. Arizona*, supra; *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

There is no evidence in the record that the petitioner, at the pretrial proceedings (T. 1, 2), had actual knowledge of the existence of his constitutional rights, a full understanding of their meaning or a clear comprehension of the consequences of his "waiver" of his rights. To the contrary, the record of the pretrial proceeding did not specify any particular constitutional

rights, and no inquiry was made to determine if petitioner understood the consequences of his waiver. Petitioner cannot be said to have knowingly and intelligently waived any constitutional rights at this proceeding.

When the State attempted the introduction into evidence of petitioner's written statement the petitioner's counsel objected on the basis that the statement was not voluntary (T. 48, 49). The trial court stated that because of the waiver at the pretrial proceeding the question of the voluntariness of the statement was also waived (T. 49). While not overruling the objection, the trial court coerced the petitioner into withdrawing the objection.

When the petitioner claimed his purported confession was involuntary, the Fourteenth Amendment's due process clause placed a duty on the judge to conduct a hearing and independently resolve the issue. If he finds the confession to be involuntary, it is to be rejected. *Jackson v. Denno*, supra.

This Court in *Sims v. Georgia*, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed. 2d 593 (1967), held the rule of *Jackson v. Denno* supra, to be "a constitutional rule binding upon the States, and under the Supremacy Clause of Article VI of the Constitution, it must be obeyed."

This Court must make its own examination of the record and make an independent determination as to the voluntariness of petitioner's statement or confession. *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 518 (1963).

There is ample evidence from the record that petitioner was intoxicated when making statements to various law enforcement officers (T. 9, 39, 54). Petitioner was not given his rights under *Miranda v. Arizona*, supra, and did not have the benefit of counsel when he made statements to the police. It is clear that the trial court intimidated petitioner's counsel and coerced him into withdrawing his objection to the admission of petitioner's written statement into evidence on the basis that it was not volun-

tarily made and thereby denying petitioner a hearing on the issue of voluntariness of the statement as required by *Jackson v. Denno*. These issues go to the heart of due process of law and were fairly before the Arkansas Supreme Court on petitioner's appeal. The Arkansas Supreme Court erroneously ruled that petitioner was not deprived of due process of law under the Fourteenth Amendment.

III

The Arkansas Supreme Court's finding that there was no preoccupation on the part of the trial judge in helping the prosecution obtain a conviction was contrary to the fair trial and due process provision of the Sixth and Fourteenth Amendments, where the record shows conduct and remarks of the trial judge and the prosecutor clearly prejudicial to the petitioner.

Petitioner on appeal raised the issue of the trial court's preoccupation in helping the prosecution obtain a conviction and therefore the issue of the Sixth Amendment's and Fourteenth Amendment's guarantee to a fair and impartial trial was fairly placed before the Arkansas Supreme Court.

Various statements made by the trial court and the prosecution in hearing of the jury were improper and inflammatory and denied petitioner a fair and impartial trial.

The State at the second trial improperly and purposely harassed petitioner's witness on cross-examination (T. 119, 120), when it persisted, over the petitioner's objection, in questioning the witness as to the meaning of his nickname of Daffy.

In *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), this Court imposed a duty on the trial court to protect a witness on cross-examination.

The State's questioning here was clearly for the purpose of harassing and embarrassing petitioner's witness and to place

him in a false light before the jury. Petitioner's objection was overruled by the trial court, clearly demonstrating the trial court's bias against petitioner.

In response to the State's question, the following exchange occurred:

> "A. I'll take number five on that until we discuss it.
>
> The Court: I will give you number one, and number two, you can answer it, and then explain it." (T. 120)

Again the trial court's bias against petitioner comes forward by the Judge's hostile and improper admonishment of a witness before the jury.

> "Hostility is a form of bias. * * * but a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial." *Whittaker v. McLean*, 118 F.2d 596; *Knapp v. Kinsey*, 232 F.2d 458. See also *U.S. v. Ah Kee Eng*, 241 F.2d 157, 62 A.L.R. 159.

Courts of the United States

> "* * * shall not only be impartial in the controversy submitted to them, but shall give assurance that they are impartial, free * * * from any 'bias or prejudice' that might disturb the normal course of impartial judgment." *Berger v. U.S.*, 255 U.S. 22, 36, 41 S.Ct. 233, 234, 65 L.Ed. 481 (1921).
>
> "Impartiality is not a technical conception. * * * A fair trial in a fair tribunal is a basic requirement of due process." *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961).

It is clear that petitioner was denied due process of law in that he was denied a fair and impartial trial. This is well founded on:

A. The fact that the judge declared a mistrial and discharged the jury at the first trial without a showing of "manifest neces-

sity" while at the second trial he sent the jury back for further deliberation;

B. The fact that the proceeding prior to the second trial was inadequate and did not show a knowledgeable waiver by petitioner of his constitutional rights coupled with the use of this alleged "waiver" to coerce the petitioner into not exercising his constitutional right to a hearing as required by *Jackson v. Denno*, supra; and

C. The demonstrable hostility and bias by the trial court by its improper remarks and its allowance of improper remarks by the prosecution.

The entire record as well as the individual incidents establishes an aura of hostility and prejudice on the part of the trial court.

CONCLUSION

The judgment below is a unique departure from the sound principles entrenched in the Fifth, Sixth and Fourteenth Amendments, and from the principles and decisions set forth by this Court which were designed to protect a citizen from being twice placed in jeopardy; from being convicted on a involuntary statement taken from him without benefit of counsel; and without knowingly and intelligently waiving such protections with full understanding of the consequences of the waiver; and from being convicted without a fair trial before an impartial Court. This petition for a writ of certiorari should, therefore, be granted.

Respectfully submitted

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